

**THE STATE OF NEW HAMPSHIRE**

**SITE EVALUATION COMMITTEE**

**SEC DOCKET NO. 2015-05**

**JOINT APPLICATION OF NEW ENGLAND POWER COMPANY  
D/B/A NATIONAL GRID &  
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE  
D/B/A EVERSOURCE ENERGY  
FOR A CERTIFICATE OF SITE AND FACILITY**

**APPLICANTS' UNASSENTED-TO MOTION FOR PROTECTIVE ORDER  
AND CONFIDENTIAL TREATMENT**

NOW COME New England Power Company d/b/a National Grid and Public Service Company of New Hampshire d/b/a Eversource Energy (the "Applicants") by and through their attorneys, McLane, Graf, Raulerson, and Middleton, Professional Association, and respectfully request that the Site Evaluation Committee ("SEC" or "Committee") issue a protective order, to preserve the confidentiality of information relating to archaeological resources data, Critical Energy Infrastructure Information ("CEII"), and other confidential infrastructure information.<sup>1</sup> In support of their Motion, the Applicants state as follows:

1. Governmental records, as defined by RSA 91-A:1-a, are generally made available for public inspection pursuant to the Access to Governmental Records and Meetings Statute (a.k.a. the Right-to-Know Law). *See* RSA 91-A:4; *see also* N.H. Admin Rule Site 104.01.

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<sup>1</sup> Confidential infrastructure information includes, but is not limited to, CEII information, critical infrastructure information as defined by the Department of Homeland Security ("DHS"), including any Protected Critical Infrastructure Information ("PCII"), to the extent certified as such by the DHS, pursuant to the Critical Information Act of 2002 (See Final Rule at 6 C.F.R. Part 29, Sept. 1, 2006); Confidential information regarding critical assets and critical cyber assets, which are subject to the North American Electric Reliability Council ("NERC") Critical Infrastructure Protection ("CIP") standards (CIP-002 through CIP-009) pertaining to the reliability and availability of the Bulk Electric System in North America ("Confidential CIP"); any other infrastructure information designated by the Company as proprietary and confidential, whether furnished before or after the date hereof, whether oral, written or recorded/electronic, and regardless of the manner in which it is furnished; and all reports, summaries, compilations, analyses, notes or other information which contain the foregoing information.

There are certain exemptions, however, from the requirement that public agencies or public bodies produce government records. One such exemption applies to “confidential, commercial, or financial information . . . and other files whose disclosure would constitute invasion of privacy.” RSA 91-A:5. As part of their Application for a Certificate of Site and Facility, the Applicants respectfully request that the Committee issue a protective order and that the Committee treat sensitive archeological information, CEII material, and other confidential infrastructure information that is included as part of the application as confidential, pursuant to RSA 91-A:5. *See also* Site 104.01(b) (presiding officer or chairman may protect documents that are exempt from disclosure pursuant to RSA 91-A:5).

2. First, the Applicants seek a protective order and confidential treatment of sensitive archaeological resources data. RSA 162-H:16, IV (c) requires that an application for a Certificate of Site and Facility, must *inter alia*, demonstrate that the project will not have an unreasonable adverse effect on historic sites. Similarly, N.H. Admin. Rule Site 301.03(c) requires an applicant to identify “other resources within or adjacent to the site,” which typically include the identification of archaeological sites. Site 301.03(i) also requires an applicant to include information “regarding the effects of the facility on, and plan for mitigation of any effects” on historic resources in the application.

3. Pursuant to the foregoing requirements, and in connection with their Application for a Certificate of Site and Facility, the Applicants have included the required information regarding archaeological resources data and archaeological sites within or adjacent to the Project area. However, pursuant to New Hampshire’s Historic Preservation Act, all information that may identify the location of archaeological sites must remain confidential and the disclosure of such information is exempt from RSA 91-A.

4. New Hampshire's Historic Preservation Act specifically provides that:

Information which may identify the location of any archaeological site on state land, or under state waters, shall be treated with confidentiality so as to protect the resource from unauthorized field investigations and vandalism. Toward this end, state agencies, departments, commissions, institutions and political subdivisions, permittees and private landowners with preservation and conservation agreements shall consult with the commissioner before any disclosure of information to insure that the disclosure would not create a risk to the historic resource or that it is done in a manner to minimize the risk. Such information is exempt from all laws providing rights to public access. Disclosure for the public record for tax assessment, transfer, sale or other consideration of the property shall receive careful consideration to minimize the risk to the resource.

RSA 227-C:11.

5. In conjunction with RSA 91-A:5, IV, which specifically provides that records pertaining to confidential information are exempt from the public disclosure requirements of the Right-to-Know Law, RSA 227-C:11 mandates that information that identifies the location of archaeological sites remain confidential. Therefore, such information should not be disclosed to the general public during the SEC proceedings.<sup>2</sup>

6. Confidential treatment of archaeological sites discovered within or adjacent to the Project Area is warranted to protect the sensitive nature of those sites and is in the public interest. In this case, granting access to the location of an archaeological site will not further any public purpose, but instead, will result in a risk of harm to the archaeological resource. Such a request is reasonable given the nature of the sites and the potential for damage to them. The Applicant, therefore, requests that the information regarding archaeological resources, contained in Appendix AM, be maintained confidentially.

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<sup>2</sup> Federal law has a substantially similar provision under the federal Freedom of Information Act ("FOIA") that protects archaeological sites. Under FOIA, "information concerning the nature and location of any archaeological resource for which the excavation or removal requires a permit or other permission under this Act or under any other provision of Federal law may not be made available to the public under [FOIA]." 16 U.S.C. § 470hh(a).

7. Second, the Applicants seek a protective order and confidential treatment of materials that are deemed CEII or are otherwise confidential infrastructure information. RSA 162-H:7, V requires that an application for a Certificate of Site and Facility describe in reasonable detail the type and size of each major part of the proposed facility. *See also* N.H. Admin. Rule Site 301.03(h)(1). The Committee's rules also require that an Applicant include information regarding a proposed project's impact on system stability and reliability. *See* Site 301.03(g)(10).

8. Pursuant to the foregoing requirements, and in connection with their Application for a Certificate of Site and Facility, the Applicants have included certain required materials that are deemed CEII or contain other confidential infrastructure information.

9. Pursuant to federal regulations, CEII means:

specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that:

- (i) Relates details about the production, generation, transportation, transmission, or distribution of energy;
- (ii) Could be useful to a person in planning an attack on critical infrastructure;
- (iii) Is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552; and
- (iv) Does not simply give the general location of the critical infrastructure.

18 C.F.R. § 388.113.

10. RSA 91-A:5, VI provides that "confidential, commercial or financial information" is exempt from disclosure. To determine whether information is exempt from disclosure because it is confidential, the benefits of disclosure to the public must be weighed against the benefits of non-disclosure. *Chambers v. Gregg*, 135 N.H. 478, 481 (1992); *see also Union Leader Corp. v. NH Housing Fin. Auth.* 142 N.H. 540, 553 (1997) (stating that "[t]he terms 'commercial or financial' encompass information such as 'business sales statistics, research data, *technical*

*designs*, overhead and operating costs, and information on financial condition’) (internal quotations and citations omitted) (emphasis added).

11. CEII materials and other confidential infrastructure information are routinely considered confidential, commercially sensitive and proprietary, and are not disclosed publicly. Extreme care must be used when protecting sensitive materials that are considered CEII or contain other confidential infrastructure information. The Applicants have provided material to the SEC, namely, technical diagrams, designs, and other information that should be protected from public disclosure because they provide specific details about the Applicants’ energy infrastructure, including, the precise location of key facilities within its transmission and distribution systems. The Applicants typically maintain this information in such a manner so as to protect the material from unauthorized access or accidental disclosure. Keeping certain CEII materials and other confidential infrastructure information from public disclosure is critical to the safe and reliable operation of the electric system in the Applicants’ service territory and is necessary to keep the general public safe.

12. Producing such information to the general public could negatively impact the energy infrastructure in the region, which substantially outweighs any public benefit. Disclosure of CEII material or other confidential infrastructure information to the general public could have a materially adverse effect on the overall operation of the region’s electrical grid and could be useful to a person seeking to damage critical infrastructure. The benefits of non-disclosure to the general public are largely outweighed by any public interest in obtaining these documents. In addition, the Applicants will not object to sharing this information with Parties<sup>3</sup> to this SEC

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<sup>3</sup> A “Party” or “Parties” to the SEC Proceeding include members of the Committee, Counsel for the Public, and any individual or organization, and their attorney, who have been granted intervener status in the SEC Proceeding by the presiding officer or chairman, pursuant to Site 202.11.

proceeding, subject to the parties being bound by the terms of the Order issued that grants this Motion.

13. Moreover, RSA 91-A:5, IV provides that records and other files whose disclosure would constitute an invasion of privacy, are exempt from the public disclosure requirements of RSA 91-A. Under the three-pronged analysis established in *Lambert v. Belknap County Convention*, 157 N.H. 375 (2008) and *Lamy v. New Hampshire Public Utilities Commission*, 152 N.H. 106 (2005),<sup>4</sup> the above mentioned information is exempt from public disclosure under RSA 91-A, IV. First, the Applicants have identified a privacy interest in the information as demonstrated above. Second, there is no prevailing public interest in disclosure of this information. Although parties to this proceeding may have an interest in this data, as discussed above, the Applicants will not object to sharing this information subject to the parties being bound by the terms of the Protective Order issued granting this Motion. Moreover, disclosure will not inform the public of the conduct or activities of its government; CEII materials and other confidential infrastructure information are maintained confidentially to ensure public safety. Third, even assuming, *arguendo*, that there is a public interest in disclosure of this information, that interest is greatly outweighed by the Applicants' privacy interests in non-disclosure to ensure the safe operation and reliability of the regions' electrical system. Moreover, subject to a protective order, the public's interest in ensuring access to public records will be preserved.

14. The Applicants, therefore, request that the CEII materials and other confidential infrastructure information displayed on Drawing Nos. S3124-P0010, Sheet 1 and S3124-P0010,

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<sup>4</sup> The same three-pronged analysis has been used by the New Hampshire Public Utilities Commission to determine whether information should be granted confidential treatment under RSA 91-A:5, IV. *See e.g.*, New Hampshire Regulated Utilities, New Hampshire Pub. Util. Comm., Order No. 25,457, 2013 WL 865994 (2013) (granting a motion for confidential treatment of certain electrical system diagrams and system circuit maps that contain information similar to or identical to that deemed by the Federal Energy Regulatory Commission to be critical energy infrastructure information (CEII) that is exempt from mandatory disclosure under the Freedom of Information Act).

Sheet 2, within Appendix R, be maintained confidentially; a protective order of limited scope is appropriate to balance the interests of the Applicants and the general public's need to access public records.

15. The above-described information contained in Appendices R and AM is submitted herewith and has been marked confidential. The Applicants may make this information available to the parties subject to a Protective Order. In light of the foregoing, the Applicants respectfully request that the Commission order that the above-mentioned drawings within Appendix R and the entirety of Appendix AM be maintained confidentially by the parties, and that a protective order be issued requiring this information to remain confidential.

16. The Applicants respectfully request the Committee issue a protective order containing provisions similar to the following:

Accordingly, a protective order is appropriate for the un-redacted versions of Appendix R and Appendix AM of the Application. This information shall therefore be marked confidential. One copy shall be filed with the Committee and maintained in a secure file separate from the public records of the proceedings in this matter.

If a Party desires to view the confidential information, said Party will execute a protective agreement in the form set forth in Appendix A, and forward true copies of the agreement to the Applicants and the Committee. Only Parties authorized by the Committee, after receipt of the executed protective agreement, shall be afforded access to the confidential information. The Parties shall not make any copies of such information or use the information for purposes other than the preparation for, and conduct of, the proceedings in this docket.

Unless otherwise ordered, the Parties shall not reference the confidential information during public proceedings in this docket or at any time in public. Upon completion of this proceeding and any resulting appeals, the Parties shall destroy any notes referencing the confidential information and return all confidential information to the Applicants. Within sixty days thereafter each Party shall certify to the Applicants that said notes have been destroyed and all confidential information returned. The rights of the Parties under this order are not assignable and may not be transferred in any manner.

Unless otherwise ordered, any future requests for a protective order, which are subsequently granted by the Committee, will be handled with the same procedures detailed above.

17. In addition to any provisions included in the order by the Commission, in order to minimize the risk of inappropriate disclosure of the Applicants' protected confidential information, the Applicants respectfully request that the Committee's Protective Order: (1) specify that the Applicants are not required to provide confidential information via electronic mail to the Parties, other than to Counsel for the Public; and (2) specify that if Parties, other than Counsel for the Public, are to be afforded access to the protected information, such access shall occur by viewing the confidential information at the Committee's offices.

18. Pursuant to N.H. Admin. Rule Site 202.14(d), the Applicants must seek concurrence. At the time of the filing of this Motion, there are no opposing Parties from whom the Applicants could seek assent.

19. To the extent the Applicants are required to submit additional confidential materials or documents relating to archaeology, CEII, or any other confidential infrastructure information, the Applicants respectfully request that the Committee afford similar treatment to such information.

20. Finally, to the extent the Applicants offer any confidential evidence at any hearing before the Committee, the Applicants respectfully request the SEC to afford similar protection to such documents that are deemed confidential. *See* Site 202.24(d).

WHEREFORE, the Applicants respectfully request that this Committee:

A. Grant the Applicants' request that the materials contained in Appendix R and Appendix AM remain confidential;

- B. Issue a protective order as requested herein that preserves the confidentiality of the documents contained in Appendix R and Appendix AM; and
- C. Grant such further relief as it deems appropriate.

Respectfully Submitted,

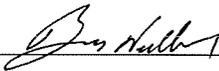
New England Power Company and

Public Service Company of New Hampshire

By its attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON  
PROFESSIONAL ASSOCIATION

Dated: July 21, 2015

By:  \_\_\_\_\_

Barry Needleman, Esq. Bar No. 9446  
Adam Dumville, Esq. Bar No. 20715  
11 South Main Street, Suite 500  
Concord, NH 03301  
(603) 226-0400  
barry.needleman@mclane.com  
adam.dumville@mclane.com

Certificate of Service

I hereby certify that on the 21<sup>st</sup> of July, 2015, an original and 18 copies of the foregoing Motion was hand-delivered to the New Hampshire Site Evaluation Committee.

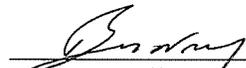
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Barry Needleman

EXHIBIT A

THE STATE OF NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE

SEC Docket No. 2015-05

CONFIDENTIALITY AGREEMENT

\_\_\_\_\_, hereby certify that I am Party<sup>1</sup> to the above-captioned proceeding and in connection with my interests therein, I request to be given access to the following Confidential Information maintained by the Site Evaluation Committee:

\_\_\_\_\_. I further certify that I have read the Site Evaluation Committee's protective order issued in the above-captioned matter, understand it and agree to be bound by it. I understand that this Exhibit A does not authorize my access to the above Confidential Information until I have signed and delivered it to counsel for New England Power Company and Public Service Company of New Hampshire, and until it has been provided to the Site Evaluation Committee by said counsel.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Signature of Party to Docket No. 2015-05

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<sup>1</sup> A "Party" or "Parties" to the SEC Proceeding include members of the Site Evaluation Committee, Counsel for the Public, and any individual or organization, and their attorney, who have been granted intervener status in the SEC Proceeding by the presiding officer or chairman, pursuant to Site 202.11.